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No. 91-2012

In The

Supreme Court of the United States

October Term, 1992

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia and ROBERT JOHNSON, individually and in his official capacity as Superintendent of Elections for Bleckley County, Georgia,

Petitioners,

v.

REV. E. K. HALL, SR., DAVID WALKER, U.S. DONALDSON, RICHARD HARRIS, WILLIE ATES, REV. WILSON C. ROBERSON, and NAACP Chapter of Cochran/Bleckley County,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive under §2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973.

PARTIES TO THE PROCEEDING

The caption contains the name of all current parties to the proceeding. Respondents initially challenged the manner of electing the Bleckley County Board of Education and the Cochran City Council, but those claims were settled prior to trial, leaving only the claim against Petitioners that was tried in the district court.

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On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

On March 25, 1992 the Eleventh Circuit reversed the district court's judgment in favor of Petitioners, and on May 27, 1992 denied Petitioners' Suggestion of Rehearing En Banc. The Eleventh Circuit's opinion is reported at *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992) and the

district court's opinion is reported at *Hall v. Holder*, 757 F.Supp. 1560 (M.D. Ga. 1991).

Both opinions are reprinted in the appendix to the Petition for Writ of Certiorari at App. 2 and App. 62.

JURISDICTION

The opinion of the Eleventh Circuit was entered March 25, 1992. Petitioners filed a Suggestion of Rehearing En Banc on April 14, 1992 which was denied May 27, 1992. A Petition for a Writ of Certiorari was brought to this Court within ninety (90) days of the opinion of the Eleventh Circuit, as required by Supreme Court Rule 13.1.

Review was sought pursuant to 28 U.S.C. § 1254(1) (1988) since Petitioners asked the Court to review the decision of the Court of Appeals entered March 25, 1992.

The Petition for a Writ of Certiorari was granted by this Court March 1, 1993.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1973 (1988)

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

STATEMENT OF THE CASE

Respondents, minority citizens of Bleckley County, Georgia, filed this lawsuit on July 17, 1985, claiming that the single county commissioner form of government in Bleckley County violates Section 2 of the Voting Rights Act of 1965. Named as defendants were Petitioners – the current sole commissioner of Bleckley County and the Superintendent of Elections for Bleckley County. After a trial, the district court ruled for Petitioners, concluding that the single commissioner system was not intended to harm the interests of minorities and did not result in a denial or abridgment of voting rights under Section 2. The Eleventh Circuit reversed, holding that Section 2 was

violated because it was possible to create a wholly different, multi-district system with one "safe" minority seat.

There are currently fourteen counties in Georgia using a single commissioner form of government. Bleckley County has used this system since its creation in 1912. *See* Bleckley, County of Creation, No. 355, 1912 Ga. Laws 38-41. The county was created from territory then comprising a part of Pulaski County. The city of Cochran was designated as the county seat. In the act creating Bleckley County, it was recognized that the voters of the county would elect one Commissioner of Roads and Revenues. Including the current commissioner, Jackie Holder, there have been seven county commissioners. Mr. Holder has been the county commissioner since 1976. Since 1912, no minority has ever run for this office.[1]

The county is 219 square miles, and its only town is Cochran. The county has a population of 10,767, of which 22% is black. The majority of Bleckley County citizens, including blacks, live in Cochran.[2]

The county commissioner has the exclusive legislative and executive authority in the county, pursuant to

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[1] In addition to having only one County Commissioner, Bleckley County has also one Sheriff, Probate Judge, Clerk of Superior Court, Tax Commissioner, Coroner, School Superintendent, County Surveyor and Magistrate, each of whom is elected by a majority of all the voters in Bleckley County. (Tr. 59-63).

[2] The Eleventh Circuit noted that since the trial, the 1990 census has become available. It reveals that Bleckley County's population has decreased to 10,430. The black population has decreased proportionately smaller than the white population, thereby causing Bleckley County to have a slightly increased percentage of blacks. 955 F.2d at 1565 n.1.

O.C.G.A. § 36-5-22.1, applicable to all 159 counties in Georgia, regardless of the number of commissioners. He is elected by a majority vote of all voters in the county, pursuant to the state election code, applicable to all local governments in Georgia. *See* O.C.G.A. § 21-2-501.

As testified to by Mr. Holder, the duties of the commissioner in Bleckley County are primarily administrative rather than legislative. The only office over which he has direct supervision of hiring and firing is the Road Department. (Tr. 497). In regard to other county departments, Mr. Holder handles the advertising for employment openings, but Mr. Holder gives the applications to the particular elected official whose office has the opening, for his recommendation. (Tr. 496-97). The county makes efforts to recruit and hire minorities. (Tr. 498).

When the county commissioner has a policy decision to make, he advertises and holds a public hearing. (Tr. 503). He also advertises the proposed budget for the county. (Tr. 516). He conducts a regularly scheduled monthly meeting. (Tr. 503).

The primary responsibilities of the commissioner are roads and bridges and managing the county on a day-to-day basis. The commissioner sets the millage rate for the county for the fiscal year, makes appointments to boards and serves on boards. Mr. Holder has appointed a black to the Board of Tax Assessors, Hospital Authority, Recreation Commission and the Health Board.(Tr. 795, 499-500). Minorities have also been appointed to serve on the Board of Family and Children's Services, Heart of Georgia Regional Development Center and Library

Board. (Tr. 500-1). The Chief Tax Appraiser for Bleckley County has been a black female. (Tr. 498).

Bleckley County has programs available for white and black citizens including a malnutrition center, maternal indigent care, a public transportation service, and an ambulance. (Tr. 516-17). The county also has a new Human Services Center where the Headstart and senior citizens programs are located. (Tr. 519).

The voting age population in Bleckley County is 19% black and 80% white. However, the voter registration level for blacks and whites is approximately 70% for each group.

In 1986, subsequent to the filing of this lawsuit, a referendum was held, in accordance with legislation enacted by the Georgia General Assembly, on the issue of whether the county should adopt a six-member county commission plan. Bleckley County – Board of Commissioners; Created; Referendum, No. 292, 1985 Ga. Laws 4406-11. The legislation proposing the Board of Commissioners was rejected by Bleckley County voters, and the sole commissioner form of government was retained by a vote of 1156 to 887. Status of Referendum Elections for the Years 1953-1986, 1987 Ga. Laws CLXXXII, CCLXXII.

There was very little organized interest or support in the black community in regard to the 1986 referendum to change the county government.[3] There was no evidence

[3] City Councilman Willie Basby, a black citizen and the councilman from Cochran's majority black city council district, testified there was very little interest or organized effort in the black community regarding the 1986 referendum. (Tr. 320-21).

in the record to support the allegation of the respondents that this 1986 referendum was conducted to maintain the sole commissioner form of government for racially discriminatory reasons.The Bleckley County Grand Jury recommended the referendum because there was dissatisfaction in the county about a tax increase.[4]

Bleckley County citizens prefer the sole commissioner form of government for the county because it is less expensive than a multi-member board, the county is small, the commissioner is accessible and responsive. It is an extremely efficient way to administer a small county.[5]

Respondents offered no evidence that the county commissioner has ever been unresponsive to the needs of minorities.[6] Indeed, the sole commissioner is the representative of the entire county, black and white, elected at-large and responsible to all voters. While it may be old-fashioned, it is the simplest, most pure and economical

[4] Dr. Bernadette Loftin, historian and resident of Bleckley County, testified that the referendum was prompted by voter dissatisfaction over a millage increase only. There was no racially discriminatory reason for the referendum. (Tr. 597).

[5] While the districting plan allowing a multi-member commission to govern Bleckley County was rejected in the 1986 referendum, only four years earlier Bleckley County voters had approved a five-member district plan for the election of the Bleckley County School Board. (Tr. 157).

[6] In a January 25, 1984 article from The Cochran Journal, black City Councilman Willie Basby stated in reference to whether the county should abandon the sole commissioner system, "[l]arger counties obviously need a commission, but one person could be good for small counties if he's an active man and deals with all the people." (Plaintiffs' Ex. 41). *See* 757 F.Supp. 1560 at 1564 (M.D. Ga. 1991).

form of efficient government for a small county. And it is one person, one vote on the most fundamental level.

As to local elections, there is no candidate slating process in Bleckley County. (Tr. 514; Tr. 392). There have been no county commissioner elections in which racial appeals to voters were made. (Tr. 514).

Although Respondents claim alleged barriers to voting, especially prior to the Civil Rights Act of 1964 and related legislation, the testimony of Respondents' lay witnesses established there have been no barriers to blacks registering to vote or voting in Bleckley County from at least 1964 to the present. (Tr. 58, 94; Tr. 259-60; Tr. 267, 286; Tr. 315-16).

Black voter registration in Bleckley County has steadily increased since 1964. The proportion of the black voting age population registered in 1988 was essentially equal to or greater than the proportion of the white voting age population registered to vote. These statistics further reveal blacks comprise approximately 19% of the voting age population and approximately 19% of the actual registered voters in Bleckley County. *Hall v. Holder*, 757 F.Supp. 1560 at 1562. As such, alleged past discrimination in Bleckley County and alleged disparities in education, housing and income do not presently hinder blacks from registering and participating in Bleckley County politics.[7]

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[7] Although Respondents made much reference at trial to the educational system in Bleckley County *prior to desegregation*, there is only one school system in Bleckley County, and blacks and whites share only one elementary school, one middle school and one high school. (Tr. 492). The schools are fully integrated. There are no private schools in Bleckley County. (Tr. 501).

Using the guidelines established by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) the district court determined that Respondents could satisfy the first *Gingles* precondition, that is, that the minority voters are geographically compact to constitute a majority in a single-member district, only if the local government were increased from a county commission of one officeholder to six officeholders.

The district court further determined, however, that Respondents had not satisfied their burden of proof regarding the second and third *Gingles* preconditions, that is, political cohesiveness and racial bloc voting. The only statistical evidence in this case relied upon by the respondents related to the two presidential campaigns of Jesse Jackson in 1984 and 1988.[8] The 1984 campaign was analyzed through regression analysis and a so-called homogeneous precinct analysis. An exit poll conducted at the time of the 1988 Jackson election was the only analysis of that election. *See* 757 F.Supp. at 1565-67.[9]

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[8] The county electorate votes at-large, in only one polling place in the city of Cochran. As such, regression analysis is not available. A number of polling places were previously available throughout Bleckley County, but these precincts were consolidated shortly after the 1984 presidential primaries. Despite the existence of only one precinct, school board members are not elected in an at-large election. Instead, the multi-member board is elected from five single-member districts. This is accomplished in the sole precinct setting by assigning the voters from each district to specified voting machines that correspond to their district. 955 F.2d 1739 n.3,4.

[9] The district court noted the political campaigns of the Reverend Jackson may in reality yield aberrant information if

Respondents' expert, Dr. Richard Engstrom, testified the statistical evidence alone provided little evidence from which a court could conclude that racially polarized voting exists in Bleckley County. (Tr. 440-41, 483).

While Respondents did not analyze any county commissioner elections, Petitioners did perform a regression analysis on the 1980 and 1988 votes cast for Petitioner Holder in the county commissioner elections and a determination of racially polarized voting could not be made. (Tr. 669-673).

As to other elections analyzed, black candidate Robert Benham received the votes of both white and black voters in Bleckley County in 1984 for the Georgia Court of Appeals. (Tr. 37-388). Judge Benham received over half of his votes from white voters. (Tr. 467).

In City of Cochran elections, black candidate Willie Basby won three at-large elections for city council against white opposition. He won twice by receiving a majority of the votes cast.[10] 757 F.Supp. at 1568.

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one seeks to determine sustained voting patterns in Bleckley County or in any other jurisdiction for that matter, citing *Citizens for a Better Gretna v. Gretna*, 636 F.Supp. 1113 (E.D. La. 1986) *aff'd*. 834 F.2d 496 (5th Cir. 1987), *cert. denied* 488 U.S. 1002 (1989). 757 F.Supp. at 1576, n.30.

[10] Respondents argue that given the racial demographics of Bleckley County, it would be necessary for a candidate, who is supported by black voters, to receive substantial white voter support in order to win a sole commissioner race. City Councilman Willie Basby testified that personal voter contact, name recognition and consensus building win elections in Bleckley County. In his opinion white voters would not discriminate against a qualified black candidate. (Tr. 313; 316-318).

The district court observed:

> It appears that the testimony of Councilman Basby serves less as evidence of racially polarized voting and more as a lesson in the dynamics of grass roots political campaigning. Nothing in the plaintiffs' evidence drawn from elections for local office leads this court to a conclusion that voting on local levels is racially polarized. 757 F.Supp. 1573-1574.

The State Election Code of 1964 requires a majority vote for all state and county elections in Georgia. O.C.G.A. § 21-2-501. As such, the county commissioner is elected by majority vote. However, no evidence was introduced to show that any candidate preferred by minority voters has been adversely affected by the majority vote requirement. No black candidate has ever run in a primary or general election in Bleckley County for the county commissioner post.

The district court found that the respondents, while meeting the first *Gingles* precondition of compactness *if* the number of county commissioners were increased to six, had failed to satisfy the second and third *Gingles* preconditions. The district court held that the respondents had failed to prove that blacks are politically cohesive, and further that the respondents had failed to establish that whites usually vote sufficiently as a bloc to defeat the minority's preferred candidate.

Nonetheless, the district court considered the other factors relevant to the "totality of circumstances" test under Section 2. S.Rep. No. 417, 97th Cong. 1st Sess. (1982). After thoroughly reviewing the so-called Senate factors, the trial court determined:

> While plaintiffs' inability to present sufficient credible evidence drawn from local elections does not foreclose a vote dilution claim, the inability to present credible evidence supportive of the factors to be considered under the Act does foreclose a successful one in the case *sub judice*. Under any standard, under any reasonable test, considering every piece of credible relevant evidence and all factors, plaintiffs' challenges to Bleckley County's single member commission must fail. 757 F.Supp. at 1583-84.

The Eleventh Circuit reversed. Relying primarily on *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988), the court of appeals held that the sole commissioner was subject to the same analysis as that employed by this Court in *Gingles*. The court of appeals further determined that the respondents had satisfied the first *Gingles* precondition merely by showing that blacks could constitute a majority of the electorate in an expanded five single-member district form of government for Bleckley County. In the court's words, it is "appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive." 955 F.2d at 1569.

The Eleventh circuit went on to evaluate the evidence and determined it established both white bloc voting and minority political cohesiveness. Accordingly, the court of appeals reversed the district court and remanded the case for imposition of a remedy.

SUMMARY OF ARGUMENT

1. Under Section 2, the inquiry is whether the existing system results in minority members having a less opportunity to participate and to elect representatives of their choice. This statute does not state, however, that electoral success is the measure of equal opportunity to participate. Section 2 is not intended to insure that numerical minorities win elections and there has never been an intent by Congress to set aside a form of government so that minority voters will automatically be able to elect minority candidates. This is specifically set forth in the proviso of Section 2(b) that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1988).

The practice of electing only one official to an office in a political subdivision, such as Bleckley County, does not deprive the minority group of an equal opportunity to participate and to elect. It does not and cannot result in vote dilution. Assuming the officeholder is not the candidate of choice of minority voters, it is the group's small size, 22% of the population and 19% of the voting age population, that prevents it from electing the representative of its choice.[11]

2. Assuming a single-member office is subject to Section 2 analysis, the Eleventh Circuit has transgressed

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[11] Petitioners' expert witness, Dr. John Wilgen, testified that in 1980 and 1988 elections for county commissioner, there was no indication of any difference in racial preferences for the election of Mr. Holder. (Tr. 660).

the mandate of Congress that Section 2 does not establish a right of a minority class to proportional representation. This was done by analyzing Bleckley County vote dilution not within the existing single-member structure, but within a wholly different, hypothetical county commission system of five members, not one.

This Court in Gingles, held that three necessary preconditions must be proven in a Section 2, vote dilution case:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multimember form of the district cannot be responsible for minority voters' inability to elect its candidates. . . . Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multi-member electoral structure thwarts distinctive minority group interests. . . . Third, the minority must be able to demonstrate the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed. . . . – usually to defeat the minority's preferred candidate.

478 U.S. at 50-51.

In light of these preconditions and the clear language of Section 2, the mere fact that a hypothetical commission of five districts, one majority black, may be drawn in Bleckley County does not in any way establish a Section 2

violation. If it did, plaintiffs would never lose a vote dilution case and proportional representation would be guaranteed.

The reasoning of the Eleventh Circuit thus authorizes a remedy for alleged vote dilution, before the necessary three preconditions have been proven. Vote dilution must be measured against the number of positions in the existing structure, not some hypothetical model based upon whatever size is necessary to accomplish proportional representation. To hold otherwise would cause a voting rights violation where none presently exists because a political structure could be divided or subdivided to insure that a minority, however small, could at least constitute a majority in a single member district. Conceivably city councils could consist of twenty members, with a majority black single-member district, a majority Hispanic single-member district, a majority Asian single-member district, a majority female single-member district.

3. This Court has held in previous cases that Section 2 should not be construed to require state and local governments to increase the number of officials elected to offices in the political structure in order to enhance the voting power of particular minority groups. *See Gregory v. Ashcroft*,___U.S.___, 111 S.Ct. 2395 (1991). Such is a function of state government. While Congress in Section 2 has prohibited electoral devices which operate to deny equal access to participation and election of candidates preferred by minority voters, it did not provide that federal courts are empowered to require changes in local government by increasing the number of officeholders. In the present case the Eleventh Circuit has suggested a 500%

increase in the size of local government in Bleckley County in order to ensure a majority black single-member district, which would be roughly proportional representation for the one-fifth black population.[12]

ARGUMENT

I. THE SECTION 2 RESULTS TEST IS NOT VIOLATED BY THE WELL-SETTLED PRACTICE OF ELECTING ONLY ONE OFFICIAL TO AN OFFICE IN A PARTICULAR GEOGRAPHIC AREA.

Section 2 of the Voting Rights Act of 1965 as amended in 1982 states in subsection (a) that no standard, practice or procedure shall be imposed which "results" in a denial or abridgment of the right of any citizen to vote on account of his race or color. Subsection (b) further provides that subsection (a) is violated if, based on a totality of circumstances, it is shown that the political processes leading to election in the political subdivision are not "equally open" to participation by members of the protected class. That is, the challengers to the system must show that the members of the protected class have "less opportunity" to "participate in the political process and to elect representatives of their choice." 42 U.S.C.

[12] Moreover, implementation of such a plan will result in a retrogression of minority influence. See *Beer v. United States*, 425 U.S. 130 (1976). Currently, blacks in Bleckley County have more "voice" in the election of a single commissioner than they would by having only one elected representative among five commissioners.

§ 1973(b) (1988). The statute limits the evidence which may be relied upon by plaintiffs by stating that the extent to which members of a protected class have been elected may be considered, however, the statute does not establish a right to have members of the protected class elected in numbers equal to their proportion in the population.

Section 2 as amended in 1988 was intended to codify the "results" test which the Supreme Court relied upon in *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and in *White v. Regester*, 412 U.S. 755 (1973).

Whereas previously members of a racial minority alleging impairment of their voting strength were required to prove that the challenged structure, such as the sole commissioner system, was created or maintained with a discriminatory purpose and led to discriminatory results, under the "results" test challenging parties may simply prove discriminatory [illegible] or vote dilution without proving any discriminatory [illegible]ent or purpose. Yet, no right to proportional representation is guaranteed under Section 2 as amended in 1988.[13]

Cases which have come before this Court have concerned multi-member systems. The challenged structure

[13] The district court determined that plaintiffs failed to provide any evidence that Bleckley County's single county commissioner structure is the product of original or continued racial animus or discriminatory intent. Thus no constitutional violation was established. 757 F.Supp. at 1571. The court of appeals held, however, that because this case established a violation of Section 2 of the Voting Rights Act, it would not reach the plaintiffs' claim of a constitutional violation. 955 F.2d at 1567 n.6.

here, however, is itself a single-member district comprised of the entire political subdivision of Bleckley County. The plaintiffs in the court below, Respondents herein, request that this political subdivision, this single-member district, be further subdivided because, they allege, it dilutes black voting strength as currently constituted. This must be proven, however, under the standards set forth by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

This Court noted in Gingles that the Senate Report which accompanied the 1982 amendments to the Voting Rights Act limited circumstances under which Section 2 violations may be proven in three ways.

> First, electoral devices, such as at-large elections, may not be considered *per se* violative of Section 2. Plaintiffs must demonstrate that under the totality of the circumstances, the devices result in unequal access to the electoral process. . . . Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. . . . Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. 478 U.S. at 50-51; S. Rep. No. 417, 97th Cong., 1st Sess. (1982).

In fact, Section 2 contains no *per se* prohibitions against any particular type of district. *Voinovich v. Quilter*, 61 U.S.L.W. 4199 (3/2/93).

The practice of electing only one official to an office in a particular geographic region or political subdivision does not deprive any minority or racial group of an equal

opportunity to participate and elect on account of race or color. Just as electoral devices such as at-large elections are not considered *per se* violative of Section 2, the mere fact that every voter in the particular political subdivision votes for a sole officeholder does not, *ipso facto*, mean minority voters have less opportunity to participate in the election of that officeholder. It is the small size of the group of voters in the district, not its race, that prevents it from achieving a greater measure of electoral success, assuming there is proof that the minority voters are not electing the candidate of their choice.[14]

Vote dilution principles govern elections to multi-member bodies. They do not apply, however, to single-member offices in which there can be no equal opportunity for representation within an office filled by only one person. In *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) the court held that a challenge to a New York law requiring run-off primary elections for mayor and other city-wide single-member offices could not be sustained. It explained that when there are elections for a multi-member body, a minority group has the opportunity to secure a "share of representation" equal to that of other groups. However, there is no such thing as a "share" of a single-member office. By definition, a single-member officeholder is the

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[14] Petitioners do not admit that Mr. Holder or any other officeholder in a sole commissioner form of government cannot also be the representative of minority voters. Evidence in this case establishes that the winner of the election for sole commissioner is heavily dependent upon black voter support for success.

representative of all the people in his electorate, whether local, state or national.

Section 2 is not intended as a way to devise a new plan to ensure black minority electoral success. If minority citizens in the single-member district involved have as great an opportunity to vote and otherwise to participate in the political process as others, then their failure to elect candidates of their choice is simply a function of the democratic process, no different from the fate of a Democrat who consistently loses in a majority Republican district. If the district line results in a racial group being a numerical minority, that group clearly will have less opportunity than others to elect candidates. In majoritarian democracy, political minorities will always be discriminated against in some fashion. Section 2 does not protect against losing elections.[15]

The form of government in Bleckley County is the purest form of democracy for a political system. Each voter in Bleckley County has one vote for the same officeholder. All votes count equally, and the winner of

[15] While the plaintiffs did not assert a claim in their complaint seeking any ruling from the court that the majority vote requirement violates Section 2 or the Constitution of the United States, the district court did not preclude the plaintiffs from offering evidence on the majority vote requirement. The court, did not consider the majority vote requirement, however, the evidence established that no black has ever been disadvantaged in any Bleckley County election because of the majority vote requirement. (Tr. 203-04). Furthermore, the majority vote requirement was a product of the overhaul of the State Election Code in 1964, and was passed by the Georgia General Assembly for all state elections.

the election represents all of the voters having been elected by a majority of the voters. The results test in Section 2 is not violated by this very old democratic practice of electing a single officeholder. The district line of Bleckley County, the boundary of the county itself, cannot be redrawn in any fashion to create a numerical black majority.

A practice of electing only one official from a particular area will certainly mean that political minority groups will not be able to achieve electoral success, if that term is interpreted to mean election of their particular candidate or the candidate of a particular race.[16] This does not mean, however, that these minority groups are denied an equal opportunity to participate in the political process to elect that official. Nevertheless, the winner of the majority votes in a democratic system is going to win. Numerical minorities do not win elections. They do, however, participate fully.

The Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971) cautioned against increasing legislative seats in proportion to increased population because it would give undue voting power to certain voters. The Court noted that the failure of ghetto residents to have legislative seats was less a function of a built-in bias than it was of the simple politics of losing elections and political defeats at the poll. As noted by the Court, " . . . typical American legislative elections are district-oriented, head on races

[16] The race of the candidate is irrelevant in a bloc voting analysis. *See Gingles*, 478 U.S. at 68.

between candidates of two or more parties. As our system has it, one candidate wins, the others lose." *Id.* at 153.

Not every minority group, whether racial, religious, political or socioeconomic, has a *right* under Section 2 to be represented. The burden of the plaintiffs is to produce evidence to support findings that the political processes *leading* to nomination in an election are not equally open to participation by the group in question. *White v. Regester,* 412 U.S. 755 (1973).

Congress did not intend under the Section 2 results test to make it easy for candidates of minority voters to be elected. The Section 2 results test is not to be construed as a replacement for hard fought political campaigning and consensus building.[17]

In Bleckley County the sole commissioner system does not violate this results test. While minority success may not be assured, the "opportunity" of minority voters to participate in the political process is exactly the same

[17] Consider the testimony of Cochran city councilman Willie Basby, a black citizen appearing as a witness for the plaintiffs below. Respondents argue that given the racial demographics of Bleckley County it would be necessary for a candidate, whether black or white, who is supported by black voters to receive substantial white voter support in order to win a sole commissioner race. Councilman Basby testified: " . . . A small town in Georgia (Cochran), you have to be known by blacks and whites to get elected for public office; therefore, you need a percentage of all black and white to get elected." (Tr. 312). Mr. Basby further testified that personal contact is the most important aspect of running for elections in Cochran and Bleckley County. (Tr. 312-318).

as white voters.[18] Opportunity to participate and ease of election are two separate matters. Section 2 is an "equal opportunity" statute, not a guarantee of election.

Furthermore, Section 2 is not designed as a remedy for past racial segregation for current socioeconomic conditions. The evidence in this case established that blacks in Bleckley County participate at a much greater level in present day Bleckley County than they did two decades ago. This is not the result of a change in the standard practice or procedure. It is the result of improved socioeconomic conditions, education and housing.[19]

[18] Of interest is the fact that no minority candidate has ever run for county commissioner. David Walker, president of the local NAACP chapter, testified, however, that a qualified black candidate for county commissioner could win. (Tr. 341).

[19] Using the 1980 black voting age population of 1,474 as a constant, the percentage of the black voting age population registered to vote was 69.74% in 1988, compared to 68.12% for whites. (Defendants' Exhibits 18 and 19). Although Respondents made much reference to alleged barriers to voting, especially prior to the Civil Rights Act of 1964 and related legislation, the testimony of Respondents' lay witnesses established there have been no barriers to blacks registering to vote or voting in Bleckley County from at least 1964 to the present. (Tr. 58, 94; Tr. 259-60; Tr. 267, 286; Tr. 315-16). Black voter registration has steadily increased since 1964. The proportion of the black voting age population registered to vote in 1988 was essentially equal to or greater than the proportion of the white voting age population registered to vote in 1986 and 1988. Blacks comprise approximately 19% of the voting age population and approximately 19% of the actual registered voters in Bleckley County. As such, any alleged past discrimination of Bleckley County or disparities in education, housing or income do not presently hinder blacks from registering and participating in Bleckley County politics.

The sole commissioner is a single-member officeholder and is the smallest political unit from which the representative is elected. There cannot be a share of this office. The office cannot be subdivided. It is, at its most fundamental, one person, one vote. If the minority is failing to elect the candidate of its choice, it is due to its numerical minority, but this in no way impedes its "opportunity" to participate.

II. IF A SINGLE MEMBER OFFICE IS SUBJECT TO SECTION 2 ANALYSIS, TO ALLOW FEDERAL COURTS TO CONSIDER VOTE DILUTION WITHIN AN EXPANDED, RESTRUCTURED FORM WILL RUN AFOUL OF CONGRESS' DECREE THAT SECTION 2 DOES NOT ESTABLISH A RIGHT TO HAVE MEMBERS OF A PROTECTED CLASS ELECTED IN NUMBERS EQUAL TO ITS PROPORTION IN THE POPULATION.

By ignoring the mandate of this Court in *Gingles* the Eleventh Circuit has eliminated the burden of proof required of Section 2 plaintiffs, and virtually ensured proportional representation. In *Gingles*, this Court announced the three preconditions plaintiffs must meet to establish the use of an at-large districting scheme results in vote dilution and a violation of Section 2. These preconditions require that a minority group demonstrate that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it is "politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

Justice O'Connor, in her concurring opinion in *Gingles*, illustrated how the new three-prong test of the majority would create "what amounts to a right to *usual, roughly* proportional representation on the part of sizeable, compact, cohesive minority groups." 478 U.S. at 91. (O'Connor, J., concurring in judgment). She explained that the majority's test, finding a violation merely upon proof of the three preconditions, would "come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2." 478 U.S. at 94. If the definition in *Gingles* of racially polarized voting is applied, which permits a finding of racial polarization even where causes other than race account for the appearance of polarized voting, then there is more of a likelihood of satisfying the *Gingles* preconditions.

The lower courts have been divided over the question of whether Section 2 plaintiffs must offer any evidence beyond proof of the three *Gingles* preconditions. The uncertainty of the Eleventh Circuit in this case as to the contours of *Gingles* is readily apparent in that the legal analysis used by the court is directly contrary to *Gingles*, and the evidence relied upon by the Eleventh Circuit in reaching its decision in no way establishes a Section 2 violation. As such, the lower court decision heightens Justice O'Connor's concern with the three-prong test.[20]

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[20] This same concern was expressed in *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 670 (1991), by Chief Judge Tjoflat, who wrote that "even if the plaintiff relies on the objective factors (. . . the

(A) The court of appeals boot-strapped the first prong of *Gingles*, "compactness," by stating: " . . . [I]t is appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive." 955 F.2d at 1569. The proof of the first precondition has thus become meaningless in the Eleventh Circuit and this new test has guaranteed a Section 2 violation where none previously might have existed. All plaintiffs need prove is that they have political cohesion and their preferred candidates usually lose elections.

The Eleventh Circuit has thus determined that a challenged mechanism's practice of electing too few officials to the particular office at issue can be responsible for the minority voters alleged inability to form a majority in a single-member district. This is not the *Gingles* test.

This type of reasoning ensures that no minority will ever fail on the issue of compactness, because any division or subdivision or further subdivision of the challenged mechanism can be drawn to ensure a majority black district in proportion to its population.[21] Honorable Edith H. Jones, concurring in *Overton v. City of Austin*, 871

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totality of the circumstances), those factors or circumstances, taken as a whole, *must show that the voting community is driven by racial bias and that the challenged scheme allows that bias to dilute the minority population's voting strength.* 899 F.2d at 1030 (Tjoflat, Chief Judge, concurring).

[21] And the smaller the districts drawn for minority voters, the greater the likelihood of political cohesion, thus reducing the importance of proof of the second *Gingles* prong.

F.2d 529 (5th Cir. 1989), cautioned against this analysis, stating:

> "[Plaintiffs'] reasoning puts the cart before the horse, by authorizing a remedy for voter dilution before a violation of Section 2 has been found. Actionable vote dilution must be measured against the number of positions in the existing governmental body rather than some hypothetical model based upon whatever size is necessary to accomplish proportional representation. Adding council member districts 'would create a voting rights violation where none presently exists by enabling appellants to meet the necessary precondition of their Section 2 claim.'" *Id.* at 543, citing *McNeil v. Springfield Park District*, 851 F.2d 937 at 946 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

Not only does this reasoning violate the mandate of this Court in *Gingles*, it also amounts to a right to "usual, roughly proportional representation on the part of sizeable, compact, cohesive minority groups." 478 U.S. 30 at 91 (O'Connor, J., concurring in judgment). For instance, if a plaintiff group seeks to challenge a multi-member system of electing five members at-large, but the plaintiff group is not sufficiently large or compact to constitute a majority in one of the existing five single-member districts, then, under the Eleventh Circuit's reasoning, the court may consider the size and geographical compactness of the minority group within a restructured form of the challenged system. The court could expand the local government five-fold, as it has done in this case, to twenty-five districts. As such, proportional representation is guaranteed.

In *Romero v. City of Pomona,* 883 F.2d 1418 (9th Cir. 1989), the court of appeals looked at a challenge to the city's at-large system for electing the mayor and four city council members. The court noted:

> "The district court properly refused to consider any plans that expanded the number of seats on the city council. If proposed districting plans with additional district seats could be considered to prove a section 2 violation, there would be no case where geographical compactness could not be demonstrated by artful gerrymandering." *Id.* at 1425 n.10, citing *McNeil v. Springfield Park District, supra.*

Bleckley County is itself a single-member district. It elects one commissioner from that single-member district. It is the smallest political unit from which the commissioner is elected. As noted in *Romero*:

> "The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these *minority voters* cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure." *Id.* at 1426.

(B) Similarly, the Eleventh Circuit ignored the mandate in *Gingles* that plaintiffs prove the existence of a politically cohesive minority group and the existence of

racial bloc voting, the second and third *Gingles* preconditions. 478 U.S. at 50-51.

Permitting proof of the three *Gingles* preconditions alone to establish a violation of Section 2 is inconsistent with Congress' rejection of a proportional representation scheme. This concern is particularly bothersome if the definition of racially polarized voting found in *Gingles,* which permits a finding of racial polarization even where factors other than race account for the appearance of polarized voting, is accepted. See 478 U.S. at 61-74 (opinion of Brennan, J.) Other courts have accepted this definition of racially polarized voting, making it apparent that the effect of this test is becoming not only widespread, but confusing.[22]

The Eleventh Circuit, while recognizing the requirement of proof of the three *Gingles* preconditions, went beyond them by declaring that there was nō limit in the manner in which the threshold factors could be proven. In addition to relaxing the proof of "compactness," it weakened proof of political cohesiveness and racial bloc voting.

In *Growe v. Emison,* 61 U.S.L.W. 4163 (2/23/93) this Court reversed the district court which had not applied the *Gingles* preconditions but instead proceeded directly to the "totality of circumstances" test. This Court noted:

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[22] *See, e.g., Carrollton Branch of NAACP v. Stallings,* 829 F.2d 1547 at 1557-1558 (11th Cir. 1987); *Solomon v. Liberty County,* 899 F.2d 1012 at 1035 n.12 (11th Cir. 1990) (Tjoflat, J. specially concurring).

> "Our precedent requires that, to establish a vote dilution claim with respect to a multimember districting plan (and hence to justify a super-majority districting remedy), a plaintiff must prove three threshold conditions." *Id.* at 4167.

In *Growe* there was no statistical evidence of minority political cohesiveness whatsoever. Nor was there any statistical evidence of majority bloc voting and anecdotal evidence was lacking. As such the district court was reversed and judgment entered in favor of the defendants, the Court noting:

> "Section 2 'does not assume the existence of racial bloc voting; plaintiffs must prove it.' " *Id.* at 4168, citing *Gingles*, 478 U.S. at 46.

The Eleventh Circuit admitted that the district court's legal interpretation of the evidence in this case would support the lower court's ultimate conclusion of a failure to establish vote dilution. The court of appeals, however, stated that the district court failed to take into account the "synergistic effects" of the evidence in establishing racially polarized voting. 955 F.2d at 1570.[23]

By "synergistic effects" the Eleventh Circuit refers to a collection of anecdotal testimony by lay witnesses of

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[23] Since the district court's findings were not clearly erroneous, under Rule 52 of the Federal Rules of Civil Procedure the decision should have been affirmed by the Eleventh Circuit. The district court did exactly what the court of appeals suggests should have been done, consider the totality of the circumstances, and there was no basis for the Eleventh Circuit to reverse the judgment except to grant proportional representation to black voters in Bleckley County by subdividing the county and expanding county government five-fold.

their "belief" that it is next to impossible for a black candidate to win an at-large, county-wide election in Bleckley County. 955 F.2d at 1571. Further, the court focused on depressed socioeconomic conditions of blacks in Bleckley County, and the county's prior history of racial segregation as evidence of present vote dilution by the use of a single member, sole commissioner system.[24]

If all the plaintiffs in a voting rights case must ever do is prove the three *Gingles* factors by, first, utilizing a new, restructured form to prove compactness, and the second and third by using anecdotal testimony alone, then every minority group will have a right to proportional representation. Whenever minority candidates are not succeeding in at-large elections and whenever the minority is large and politically cohesive, the only explanation for the lack of success of the minority candidates would be white bloc voting.

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[24] The Eleventh Circuit also implied some concern with the location where elections are held in Bleckley County. The election for county commissioner as well as all other county elections is held in a metal building known locally as the "Jaycee Barn." It is owned by a local civic club. When the precincts were consolidated in 1984, it was with the approval of the Justice Department. The location of the Jaycee Barn is adjacent to School Board District No. 2, the majority black district, and within walking distance of many black homes, the majority of blacks in Bleckley County living in Cochran. It is also the site of the annual county fair. No evidence was introduced to show that any voter has been prevented from voting because of the site of the polling place. (Tr. 493). If any group of voters is disadvantaged by the location of the polling place, it is white voters living in outlying areas of the county.

Such an analysis affords defendants no opportunity to rebut a plaintiff's claim that the political process is closed to the minority group. Such an analysis does not guarantee equal access to the political process, but creates a right to proportional representation.

Moreover, under the logic of the court of appeals, to show vote dilution under Section 2 plaintiffs need only to claim that the challenged structure is responsible for the minority group's inability to form a majority in a single-member district, and that an enlarged government would remedy the situation. This standard of review is contrary to *Gingles* since it omits the requirement that the court independently address the issue of political cohesiveness and racial bloc voting as preconditions. The court of appeals initially recognized the proper legal standard while discussing the *Gingles* requirements:

> " . . . [T]he *Gingles* decision places a 'gloss' on the Senate Report factors, limiting the use of the factors by requiring that the three *Gingles* factors be established to prove a vote dilution claim." 955 F.2d 1568.

Yet the Eleventh Circuit then based its determination that the *Gingles* preconditions had been established on factors in no way dispositive of the issues, stating, "[t]he *Gingles* majority did not, however, limit the manner in which the threshold factors may be proven." *Id.*

For instance, the Court in *Gingles* made clear that "the race of the candidate per se is irrelevant to racial bloc voting analysis." 478 U.S. at 67. The fact that the race

of the candidate is irrelevant to a racial bloc voting analysis had been recognized by the Eleventh Circuit in *Carrollton,* wherein the court correctly interpreted *Gingles* to mean that it is the status of the candidate as the chosen representative of a particular race or group, not the race of the candidate, that is important. 829 F.2d at 1557. This interpretation of *Gingles* was also recognized by the en banc decision of the Eleventh Circuit in *Solomon v. Liberty County,* 899 F.2d 1012 (11th Cir. 1990) at 1021 n.12.

Here, however, the Eleventh Circuit's first consideration under its review of the evidence submitted on the issue of racial bloc voting was as follows:

> "Yet, blacks have neither sponsored candidates nor run for county-wide positions in Bleckley County's government. . . . Lay testimony by Bleckley County's black community leaders, many of whom are seasoned politicians, revealed a *belief* that it is next to impossible for a black candidate to win an at-large, county-wide election in Bleckley County, primarily because of the impact of the non-Cochran vote, a vote having a substantially lower percentage of blacks." 955 F.2d at 1570-71 (emphasis added).

This focus is directly contrary to the *Gingles* instruction that "only the race of the voter, not the race of the candidate is relevant to vote dilution analysis." 478 U.S. at 68.[25]

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[25] Even assuming the race of the candidate is relevant to a vote dilution analysis, the subjective belief of the witnesses proves nothing as it is speculative and conjectural. For example, in *Sonnier v. Vinton,* 484 F.Supp. 146 (W.D. La. 1980), the court rejected evidence that "blacks . . . had a defeatist attitude and

The Eleventh Circuit erroneously gave undue weight to the subjective, speculative "beliefs" of Respondents' witnesses and the fact that no black has run for the county commissioner position in finding Respondents had satisfied the precondition of racial bloc voting. Respondents argue they could not produce statistically significant evidence of bloc voting in light of the limited number of candidates. However, since the race of the candidate is irrelevant the Eleventh Circuit allowed the Respondents once again to boot-strap proof of bloc voting.[26]

Although there were numerous and various elections that could have been analyzed by Respondents, they made the decision not to analyze *any* elections involving white candidates, and presented only statistical evidence as to campaigns of Jesse Jackson, which Respondents admitted were not sufficient to establish a consistent pattern of racial bloc voting.[27]

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did not believe that a black could ever become elected because of at-large voting," and held it "would not be sufficient to find that the political process . . . is not equally open to participation by blacks." *Id.* at 148-149.

[26] Respondents' expert, Dr. Richard Engstrom, offered opinions concerning the campaigns of Jesse Jackson solely because they involved a black candidate. He did not offer opinions concerning other elections, such as for county commissioner, that could be analyzed even though he admitted a white candidate can be the choice of black voters. (Tr. 448).

[27] Dr. Engstrom testified:

Q. Is it your opinion that in Bleckley County, Georgia, evidence establishes that there is white – there will consistently be a white bloc vote to defeat minority voters and cross-over voters?

A. That the evidence that I have looked at establishes that?

Q. Yes.

This Court recently held in *Growe v. Emison*, 61 U.S.L.W. 4163 (2/23/93) that the three *Gingles* pre-requisites continue to apply.

> "The 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. . . . And the 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population. . . . Unless these points are established, there neither has been a wrong nor can be a remedy." *Id.* at 4168.

In *Growe* the Court determined that the *Gingles* preconditions were not only ignored but were unattainable. There was no statistical evidence of minority political cohesion or majority bloc voting. The Court noted that even anecdotal evidence was lacking. *Id.* at 4168.[28]

A. You mean based on the statistical evidence? Is that what you're asking me?

Q. Based on the evidence, the statistical evidence you have looked at?

A. I can't say that statistical evidence alone establishes that; no. (Tr. 440-41).

[28] As noted by Justice Scalia in *Growe*, *Gingles* expressly declined to resolve the applicability of the showing of compactness of a minority group under claims of a minority's inability to influence, rather than alter, election results. Neither has such claim been made in this case. *See Growe* at 4168, n.5, citing *Gingles* at 478 U.S. at 46-47, n.12.

(C) As for the existence of political cohesiveness, the Eleventh Circuit summarily dealt with the district court by stating:

> "In reviewing this *Gingles* factor, the district court essentially committed the same error that it committed in analyzing the issue of racial bloc voting. That error was further compounded because the district court evaluated the existence of political cohesiveness after concluding that there was no racially polarized voting in Bleckley County." 955 F.2d at 1573.

The court of appeals then stated that proof of racial polarization may be all that is needed in order to find cohesiveness, and that was the situation in Bleckley County. Thus a new standard was established by the Eleventh Circuit that once racial bloc voting is determined, *ipso facto* there is also proof of political cohesiveness. *Gingles*, on the other hand, requires a separate determination as to each precondition, based upon a review of the evidence.[29]

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[29] Consider for instance the testimony of plaintiff David Walker, President of NAACP Chapter of Cochran/Bleckley County, for six years, that there are differences of opinion in the black community in Bleckley County on political matters and that the black community as a whole does not vote the same way in each election. (Tr. 341-43). Consider further the testimony of Respondents' expert, Dr. Bernadette Loftin, historian, who researched this issue and determined there was no evidence of political organization among black citizens in Bleckley County. (Tr. 601). Moreover, Willie Basby, who was successful in at-large campaigns for city council in Cochran, Georgia, testified that when the 1986 referendum to change the form of county government was at issue, there was very little organized interest in the black community in the referendum. (Tr. 320-21).

With the reduced burden of proof promulgated by the Eleventh Circuit, proportional representation has become assured.

III. SECTION 2 SHOULD NOT BE CONSTRUED TO ALLOW FEDERAL COURTS TO REQUIRE STATE AND LOCAL JURISDICTIONS TO INCREASE THE NUMBER OF OFFICIALS ELECTED TO PARTICULAR OFFICES IN ORDER TO ENHANCE THE VOTING POWER OF PARTICULAR MINORITY GROUPS.

This Court stated recently in *Voinovich v. Quilter*, 61 U.S.L.W. 4199 (3/2/93), that Section 2 contains no *per se* prohibitions against particular types of districts. Rather, Section 2 focuses only on the consequences of a particular structure. Where the challenged voting scheme does not have the effect of denying a protected class the equal opportunity to elect its candidate of choice, there is no violation of Section 2.[30]

Given the fact that Respondents seek to set aside the form of government that was retained by a majority of votes cast in the 1986 referendum, it is highly relevant to the issue of political cohesiveness that there was little interest in the black community regarding the issue of whether Bleckley County should adopt a multi-member board of commissioners.

[30] The Court in *Voinovich* noted that the appellees raised an "influence-dilution" claim. The Court, however, assumed without deciding that the appellees stated a cognizable Section 2 claim. Interestingly, in *Voinovich*, the appellees contended that the plan "packed" black voters by creating districts in which they would constitute a disproportionately large majority. This, they contended, minimized the total number of districts in which the black voters could select their candidate of choice. In

In *Voinovich* this Court was equally concerned with the intervention of the lower federal courts in state apportionment in the absence of a violation of federal law. Justice O'Connor observed:

> "Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place. Time and again we have emphasized that 'reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' " 61 U.S.L.W. at 4202, citing *Growe, supra,* at 4166.

Indeed, the Court in *Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395 (1991) advised against a construction of Section 2 that requires state and local jurisdictions to increase the number of officials elected to particular offices in order to enhance the voting power of particular groups. The Court in *Gregory* recognized that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." ___ U.S. at ___, 111 S.Ct. at 2401.

Section 2 contains no language, and there is no evidence of any intent on the part of Congress, to authorize

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Bleckley County, the respondents would have the court "pack" black voters into one district out of five, whereas their ability to "influence" the political process is arguably greater in the single-member district where they constitute one-fifth of the voting population. The respondents herein, however, have not argued their inability to "influence" elections.

federal courts to assume functions of state government to find a Section 2 violation and then to impose a remedy. Here the Eleventh Circuit has done precisely that, however, first by finding a Section 2 violation using a new, altered system as the guideline, relaxing proof of racial bloc voting and political cohesiveness, and then imposing that remedy on Bleckley County.

The proposition that federal courts may use their equitable powers to require a major change in the size of a political body, even as a remedy for a constitutional as opposed to a statutory violation, was rejected by this Court in *Minnesota State Senate v. Beens*, 406 U.S. 187, 196-200 (1972). Size of government is a function of the states, not of the federal courts.[31]

Other lower courts have warned against changing the size of local government. In *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) the court of appeals cautioned against adding seats to the local governmental body, which would create a voting rights violation where none presently existed, by enabling the plaintiffs to meet the necessary preconditions

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[31] *Houston Lawyers' Ass'n. v. Attorney General of Texas*, ___ U.S. ___, 111 S.Ct. 2376 (1991) is inapplicable to this case. In *Houston Lawyers'*, a challenge was made to the at-large multi-member election of county judges on a county-wide or wider basis. Each judicial electoral district elected more than one judge. However, *Houston Lawyers'* did not decide whether the electoral scheme was invalid under Section 2. The only question before the court in that case was whether Section 2 "applied to the election of trial judges in Texas." *Id.* at 2378.

of their Section 2 claim.[32] In the context of the sole commissioner in Bleckley County, a federal court mandate to increase local government five-fold should not be substituted for minority political organization.

[32] An expansion is not authorized by the holding in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988). As noted by the *McNeil* court, the facts of *Carrollton* are clearly distinguishable. In *Carrollton* the membership of the county commission was changed from five to three and later to one as the black voting age population rose. There was direct evidence that the single county commission form had been adopted in 1947 solely to defuse black voting strength. *McNeil*, 851 F.2d at 946. No such evidence was presented in Bleckley County, which has known no other form of local government in its eighty-year existence.

CONCLUSION

For the reasons set forth above, the decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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